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Court of Appeals No. 36245-7-II

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SUPREME COURT OF THE STATE OF WASHINGTON

AMERIQUEST MORTGAGE COMPANY,

Plaintiff/Appellant

v.

OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON ET AL.,

Defendants/Respondents

ANSWER TO MEMORANDUM OF AMICUS CURIAE

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A. Introduction.

Plaintiff/Appellant Ameriquest Mortgage Company (“Ameriquest”) submits this answer to the brief of *amicus curiae* Washington Coalition for Open Government (“WCOG”) in support of the petition for review filed by Defendant/Respondent Office of the Attorney General of Washington (“AGO”). For all the reasons stated below and in Ameriquest’s answer to the AGO’s petition, Ameriquest respectfully requests this Court to deny the AGO’s petition for review of the Court of Appeals’ January 6, 2009 opinion (the “Opinion”).<sup>1</sup>

Just as the AGO was dismissive of, and failed to satisfy, the strict requirements for granting review under RAP 13.4(b), the WCOG fails to even mention RAP 13.4(b) much less address any of its standards. As Ameriquest explained in detail in its Answer to the petition, the Court of Appeals Opinion was consistent with existing precedent, *i.e.*, the opinion in Northwest Gas Ass’n v. Washington Utilities & Transportation Commission, 141 Wn. App. 98, 168 P.3d 443 (2007), rev. denied, 163 Wn.2d 1049, 187 P.3d 750 (2008), and was also correct as a matter of law. (The WCOG is in agreement with Ameriquest that the Opinion was correct in stating that Ameriquest had standing to seek review of the AGO’s decision to waive applicable PRA exemptions and that review should be denied. WCOG Br., pp. 7-9.)

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<sup>1</sup> For consistency, Ameriquest will refer to the same pagination as the opinion submitted with the AGO’s Petition for Review.

Without citation to any provision of RAP 13.4(b), the WCOG makes several arguments for grant of review. First, the WCOG argues that review is warranted because the Court of Appeals “engaged in a preemption analysis that is both unnecessary and erroneous,” and “ignored two [other statutes] provisions of the PRA.” WCOG Br., pp. 2, 5. Second, the WCOG seeks review of the Court of Appeals’ requirement that notice be provided to Ameriquest’s customers whose documents are earmarked for disclosure. These arguments are unpersuasive and do not justify review.

Remarkably, while the WCOG says it “takes no position” on whether the Court of Appeals properly interpreted the GLBA, it asserts, contrary to the Court of Appeals’ findings, that “there is no real conflict between the GLBA and PRA.” WCOG Br., p. 3, 5 n.1. This argument ignores the Court of Appeals’ reasoned analysis and the case law, federal regulations and other legal authority cited in Ameriquest’s Answer. More puzzling is the WCOG’s failure to address any of the legal arguments or authorities cited by Ameriquest in any meaningful way, even though it justified its lengthy delay in filing its brief claiming it needed time to review Ameriquest’s Answer and to research and evaluate complex legal issues. WCOG Motion for Leave, p. 5. Since the WCOG is an admitted frequent user of the PRA and a regular *amicus curiae* filer in PRA cases, its failure to address the holding of Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d 243, 884 P.2d 592 (1994) (“PAWS”), a seminal case on PRA and preemption issues, is telling. The WCOG’s choice to refrain from addressing any of Ameriquest’s substantive arguments

regarding the GLBA and how it preempts the PRA speaks volumes about the lack of strength of the WCOG's arguments. Moreover, the WCOG's criticism of the notice requirement is flawed as it rests not on the substantive reasoning of the Court of Appeals but on the WCOG's erroneous claim that the PRA is the only governing statute, and ignores the Court of Appeals' holding that the GLBA contains notice provisions and preempts the PRA. Neither the AGO Petition nor the WCOG brief provide any grounds for this Court to review the Court of Appeals Opinion.

B. Why Review Should Be Denied.

1. The Court of Appeals Correctly Determined that the GLBA Preempts the PRA. The WCOG gives the Court of Appeals' decision too little credit. In its brief, the WCOG incorrectly claims that the Court of Appeals "never explained how the PRA conflicts with the GLBA." WCOG Br., p. 2. Yet, this issue was discussed extensively by the Court of Appeals -- it spent six pages of its Opinion explaining how the GLBA expressly preempts less protective state laws and engaging in an in-depth analysis of how the PRA was inconsistent with, and less protective than, the GLBA. Opinion, pp. 9-16.

Moreover, as addressed more specifically in Ameriquet's Answer to the Petition, the Court of Appeals did not improperly ignore the "other statutes" provision of the PRA.<sup>2</sup> The Court of Appeals understood that

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<sup>2</sup> While the "other statutes" provision may have been briefly touched on before the trial court, it was not an issue heavily briefed on appeal because the AGO consistently argued that it could disclose the documents regardless of whether the GLBA applied.

when there is a conflict between the PRA and other statutes, the PRA would govern, *absent preemption*. PAWS, 125 Wn.2d at 261-62. The PAWS decision not only supports the preemption approach of the Court of Appeals, it compels it. The PAWS court analyzed state statutes that *meshed* with the PRA under the “other statutes” exemption. But when asked to address whether certain federal statutes act to limit disclosure under the PRA, the PAWS court analyzed the federal statutes under preemption principles and not under the PRA “other statutes” exemption. The PAWS court found that federal preemption of the PRA may occur if “Congress passes a statute that expressly preempts state law.” Id. at 265. Therefore, under the guidelines set down by PAWS, the Court of Appeals properly engaged in a preemption analysis and correctly determined that the GLBA expressly preempts the PRA.

Despite taking additional time to prepare its brief, the WCOG either misread or ignored the PAWS holding, failed to provide any persuasive authority in Washington to support its position, and completely ignored the provisions of the GLBA to such a degree that it had “no opinion” on the interpretation of the GLBA. Indeed, the WCOG cites only a few cases in its brief, none of which support its position regarding preemption. The fact that the WCOG does not cite the applicable Washington case law and does not address at all the federal authority that makes clear the Court of Appeals’ decision was correct, demonstrates that the law is not on their side. The Court of Appeals Opinion was correct as

a matter of law and the WCOG's conclusory argument does not weigh in favor of granting the petition.

2. The Court of Appeals Prudently Required Notice to Ameriquest's Customers Based on the Facts of this Case. In this case, the AGO is planning to disclose highly confidential information from the mortgage loan files of Ameriquest's customers. This information is protected by federal financial privacy rights as set forth in the GLBA, which was just recently enacted to address the very protections the WCOG attempts to undermine. As Ameriquest has explained previously, the GLBA requires that consumers be given notice prior to disclosure of their financial information. Here, the Court of Appeals has ordered that the AGO undertake these notice obligations in this case consistent with the GLBA.

WCOG's issue with the Court of Appeals appears to be less with the substantive legal support for the decision and more to the potential confusion that, it argues, could result in future PRA cases. The Court of Appeals was clear that it was the GLBA -- not the PRA -- which is the operative statute governing the documents -- "the GLBA preempts the PRA in this case." Opinion, p. 10. Despite this clear language, the WCOG underestimates the capability of the courts to understand that the notice process designed by the Court of Appeals for this case is limited to these facts and the GLBA. Future courts need no help to understand that this decision does not lead to some sort of generalized requirement for all PRA cases. Review by this Court cannot be justified when the only purpose would be to rewrite what is already clear enough.


3. The Court of Appeals' Recognition of the Reviewability of the AGO's Decision-making Should Not Be Reviewed. Like Ameriquest, the WCOG saw little merit in the AGO's arguments for review of the Court's of Appeals decision with respect to the reviewability of the AGO's decisions. Ameriquest does not endorse all of WCOG's arguments on this point, but the conclusion is identical -- the Court of Appeals' decision in this regard should not be reviewed.

C. Conclusion.

For all of the reasons stated above and in Ameriquest's answer to the petition for review, this Court should deny the AGO's petition and permit this matter to return to the trial court for additional proceedings.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of June, 2009.

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